UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*, Plaintiffs, v. DONALD TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 8:17-cv-00361-TDC
IRANIAN ALLIANCES ACROSS BORDERS, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 8:17-cv-02921-TDC
EBLAL ZAKZOK, *et al.*, Plaintiffs, v. DONALD TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 1:17-cv-02969-TDC

DEFENDANTS' COMBINED MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants hereby move to dismiss the complaints in all three above-captioned cases for failure to state a claim upon which relief can be granted. *See* 2d Am. Compl., *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-361-TDC (D. Md. Oct. 5, 2017), ECF No. 203; 2d Am. Compl., *Iranian Alliances Across Borders v. Trump*, No. 8:17-cv-02921-TDC (D. Md. Nov. 2, 2018), ECF No. 78; Am. Compl., *Zakzok v. Trump*, No. 8:17-cv-2969-TDC (D. Md. Nov. 2, 2018), ECF No. 62. The reasons supporting Defendants' motion are set forth in the accompanying memorandum of law.

Dated: November 7, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT K. HUR
United States Attorney

JOHN R. TYLER
Assistant Director, Federal Programs Branch

/s/ Daniel Schwei
DANIEL SCHWEI (Bar No. 96100)
MICHELLE R. BENNETT (Bar No. 806456)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington DC 20005
Tel: (202) 305-8693
Fax: (202) 616-8460
E-mail: daniel.s.schwei@usdoj.gov

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DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Executive Materials

Other Authorities

INTRODUCTION

Earlier this year, the Supreme Court upheld the validity of Proclamation No. 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats*, 82 Fed. Reg. 45,161 (Sept. 27, 2017), by rejecting a number of statutory and constitutional challenges and reversing a nationwide preliminary injunction prohibiting the Proclamation's enforcement. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Notwithstanding the Supreme Court's decision, plaintiffs in these three cases seek to continue with their challenges to the Proclamation—even though the plaintiffs here raise largely the same claims and arguments that the Supreme Court has already rejected. Plaintiffs' claims are meritless, and the complaints in all three cases should be dismissed for failure to state a claim.

First, none of plaintiffs' statutory claims may proceed. The Supreme Court unequivocally rejected the claims that the Proclamation exceeds the President's authority under 8 U.S.C. § 1182(f) and violates the non-discrimination provision of 8 U.S.C. § 1152(a)(1)(A). As for plaintiffs' other statutory claims, they are likewise foreclosed. Judicial review of the Proclamation is unavailable under the Administrative Procedure Act (APA) because the Proclamation is Presidential action for which APA review is unavailable, and also because plaintiffs fail to satisfy other threshold requirements for APA claims. With respect to claims under the Refugee Act, the Proclamation does not address refugee-related issues at all. And as for claims under the Religious Freedom Restoration Act (RFRA), plaintiffs have not identified any particular plaintiff's exercise of religion that has been substantially burdened by the Proclamation. All of plaintiffs' statutory claims therefore fail on the merits. Even if the Court is not inclined to dismiss the claims on the merits, however, the claims should still be dismissed for lack of justiciability based on fundamental principles of non-reviewability.

Second, plaintiffs' constitutional claims also fail. In *Hawaii*, the Supreme Court made clear

that all constitutional challenges to the Proclamation brought by U.S. citizens are governed by the deferential standard of review set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). And the Court made equally clear that the Proclamation satisfies not only that standard but also rational-basis review. Rejecting each of the arguments plaintiffs make here, the Court held that "there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility," and therefore the Court "must accept that independent justification." *Hawaii*, 138 S. Ct. at 2421. The Supreme Court's decision thus forecloses plaintiffs' constitutional claims as well.

BACKGROUND

I. Legal Framework

"The exclusion of aliens is a fundamental act of sovereignty" that both is an aspect of the "legislative power" and also "is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

Under the Immigration and Nationality Act (INA), admission to the United States normally requires a valid visa or other valid travel document. 8 U.S.C. §§ 1181, 1182(a)(7)(A)(i) and (B)(i)(II), 1203. Applying for a visa typically requires an in-person interview and results in a decision by a Department of State consular officer. *Id*. §§ 1201(a)(1), 1202(h), 1204; 22 C.F.R. §§ 41.102, 42.62. Although a visa generally is necessary for admission, it does not guarantee admission; the alien still must be found admissible upon arriving at a port of entry. 8 U.S.C. §§ 1201(h), 1225(a). Congress has enabled certain nationals of certain countries to seek temporary admission without a visa under the Visa Waiver Program. *Id*. §§ 1182, 1187.

Building upon the President's inherent authority to exclude aliens, *see Knauff*, 338 U.S. at 542, Congress has likewise accorded the President broad discretion to restrict the entry of aliens. Section 1182(f) of Title 8 authorizes the President to "suspend the entry of all aliens or any class

of aliens" "for such period as he shall deem necessary" whenever he finds that such entry "would be detrimental to the interests of the United States." Section 1185(a)(1) further empowers the President to adopt "reasonable rules, regulations," "orders," and "limitations and exceptions" on the entry of aliens.

II. Executive Order No. 13,780 and the Proclamation

On March 6, 2017, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) [hereafter "EO-2"]. Among other things, EO-2 directed the Secretary of Homeland Security to conduct a global review to determine whether foreign governments provide adequate information about their nationals seeking U.S. visas. *See* EO-2 § 2(a). EO-2 directed the Secretary to report to the President which countries do not provide adequate information, after which nations identified as deficient would have time to alter their practices, prior to the Secretary recommending entry restrictions on nations that remained inadequate or presented other special circumstances. *See id*. § 2(d)-(f).

The Department of Homeland Security (DHS), in consultation with the State Department and the Office of the Director of National Intelligence, conducted the review EO-2 had directed. Procl. § 1(c). The agencies undertook "to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA . . . in order to determine that the individual is not a security or public-safety threat." *Id.* The review examined "[i]nformation-sharing and identity-management protocols and practices of foreign governments," because it is those governments that "manage the identity and travel documents of their nationals and residents" and "control the circumstances under which they provide . . . information about known or suspected terrorists and criminal-history information." *Id.* § 1(b).

The agencies developed a "baseline" for the information required from foreign governments, which incorporated three components:

> (i) identity-management information, *i.e.*, "information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be," which includes "whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports";
>
> (ii) national-security and public-safety information about whether a person seeking entry poses a risk, which includes "whether the country makes available . . . known or suspected terrorist and criminal-history information upon request," "whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States," and "whether the country provides passport and national-identity document exemplars"; and
>
> (iii) a national-security and public-safety risk assessment, which includes "whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program . . . that meets all of [the Program's] requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States."

Procl. § 1(c).

DHS, in coordination with the State Department, collected and evaluated data regarding all foreign governments. *Id.* § 1(d). Applying the baseline factors, DHS identified 16 countries as having "inadequate" information-sharing practices and risk factors, and another 31 countries as "at risk" of becoming "inadequate." *Id.* § 1(e). The State Department then conducted a 50-day diplomatic engagement to encourage all foreign governments to improve their performance, yielding significant improvements from many countries. *Id.* § 1(f). Multiple countries provided travel-document exemplars to combat fraud and/or agreed to share information on known or suspected terrorists. *Id.*

After completing the review, the then-Acting Secretary of Homeland Security identified seven countries that, even after diplomatic engagement, continued to have inadequate identity-

management protocols or information-sharing practices, or other heightened risk factors: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. Procl. § 1(g) and (h). The Acting Secretary recommended that the President impose entry restrictions on certain nationals from those countries. *Id.* § 1(h). She also recommended entry restrictions for certain nationals of Somalia, because although Somalia generally satisfies the information-sharing component of the baseline standards, it has other heightened risk factors, including "identity-management deficiencies" and a "significant terrorist presence." *Id.* § 1(i).[1]

On September 24, 2017, after evaluating the Acting Secretary's recommendations, and in consultation with multiple Cabinet members and other officials, the President issued the Proclamation. Procl. § 1(h)(i). Considering numerous factors—including each country's "capacity, ability, and willingness to cooperate with our identity-management and information-sharing policies and each country's risk factors," as well as "foreign policy, national security, and counterterrorism goals"—the President found that entry of certain foreign nationals from the eight countries identified by the Acting Secretary "would be detrimental to the interests of the United States." *Id.* at pmbl., § 1(h)(i).

Based on that finding and "in accordance with the [Acting Secretary's] recommendations," the President imposed tailored restrictions on those nationals' entry. *Id.* § 1(h)(i)-(iii). He determined that the restrictions are "necessary to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States," and "to elicit improved identity-management and information-sharing

[1] The Acting Secretary assessed that Iraq does not meet the baseline, but she recommended not restricting entry of Iraqi nationals given the close cooperative relationship between the U.S. and Iraqi governments, the strong U.S. diplomatic presence in Iraq, the significant presence of U.S. forces there, and Iraq's commitment to combatting ISIS. Procl. § 1(g).

protocols and practices from foreign governments." *Id.* § 1(h)(i). He explained that these "country-specific restrictions" would be the "most likely to encourage cooperation given each country's distinct circumstances," while "protect[ing] the United States until such time as improvements occur." *Id.*

For countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), the Proclamation largely suspended entry of all nationals, except for Iranians seeking nonimmigrant student (F and M) and exchange-visitor (J) visas. *Id.* § 2(b)(ii), (d)(ii), and (e)(ii). For countries that are valuable counter-terrorism partners but have deficiencies (Chad, Libya, and Yemen), the Proclamation suspended entry only of nationals seeking immigrant visas and nonimmigrant business, tourist, and business/tourist visas. *Id.* § 2(a)(ii), (c)(ii), and (g)(ii). For Somalia, the Proclamation suspended entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas, in light of the "special concerns that distinguish it from other countries." *Id.* § 2(h)(i)-(ii). For Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation suspended entry only of government officials "involved in screening and vetting procedures" and "their immediate family members" on nonimmigrant business or tourist visas. *Id.* § 2(f)(i)-(ii).

The Proclamation provides for exceptions and case-by-case waivers when a foreign national demonstrates undue hardship and that his entry would not pose a threat to the national security or public safety and would be in the national interest. *Id.* § 3(c)(i)(A)-(C). The State Department has publicly reported that it has issued thousands of waivers under the Proclamation,

and is continuing to review and issue waivers on an ongoing basis.[2]

The Proclamation also requires the agencies to assess on an ongoing basis whether entry restrictions should be continued, modified, terminated, or supplemented, and to report these recommendations to the President every 180 days. *Id.* § 4. As part of that reporting process, and as a result of progress made to address the Proclamation's baseline standards, in April 2018 the President determined, on the recommendation of the Secretary of Homeland Security, that it was appropriate to remove the entry restrictions on nationals of Chad. *See* Proclamation No. 9723, *Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, 83 Fed. Reg. 15,937 (Apr. 13, 2018).

III. Procedural History

The Proclamation was challenged in this Court and several others. Here, plaintiffs in three cases sought to challenge the Proclamation on a variety of statutory and constitutional grounds, on behalf of both individual plaintiffs and organizations. *See* 2d Am. Compl., *Int'l Refugee Assistance Project (IRAP) v. Trump*, No. 8:17-cv-361-TDC (D. Md. Oct. 5, 2017), ECF No. 203; Am. Compl., *Iranian Alliances Across Borders (IAAB) v. Trump*, No. 8:17-cv-02921-TDC (D. Md. Oct. 12, 2017), ECF No. 37; Compl., *Zakzok v. Trump*, No. 8:17-cv-2969-TDC (D. Md. Oct. 6, 2017), ECF No. 01.

This Court entered a global preliminary injunction prohibiting enforcement of the Proclamation's entry suspensions, except with regard to nationals of North Korea, nationals of Venezuela, and individuals lacking a credible claim of a bona fide relationship with a person or

[2] *See* U.S. Dep't of State, *June 26 Supreme Court Decision on Presidential Proclamation 9645*, http://goo.gl/nQBuWK (last visited Nov. 6, 2018) ("As of October 31, 2018, 2,072 applicants were cleared for waivers after a consular officer determined the applicants satisfied all criteria and completed all required processing. Many of those applicants already have received their visas."); *cf.* Zakzok Am. Compl. (ECF No. 62) ¶¶ 10-11 (noting that two plaintiffs' relatives have received waivers to the Proclamation and have already entered the country).

entity in the United States. *See IRAP v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017). The *en banc* Fourth Circuit affirmed this Court's decision. *See IRAP v. Trump*, 883 F.3d 233 (4th Cir. 2018).

Separately, a district court in Hawaii entered a worldwide temporary restraining order (TRO) barring enforcement of the Proclamation's entry suspensions except as to nationals of North Korea and Venezuela. *See Hawaii v. Trump*, 265 F. Supp. 3d 1140 (D. Haw. 2017). The district court converted its TRO into a preliminary injunction, and the Ninth Circuit then affirmed that injunction except as to aliens lacking a credible claim of a bona fide relationship with a person or entity in the United States. *See Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017).

The Supreme Court granted review over the Ninth Circuit's decision and then reversed the injunction. The Court rejected both statutory and constitutional challenges to the Proclamation, *see Hawaii*, 138 S. Ct. at 2407-23, concluding that "[b]ecause plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion." *Id.* at 2423. The Court also provided that "[t]he case now returns to the lower courts for such further proceedings as may be appropriate." *Id.* Following the Supreme Court's decision, the challengers in *Hawaii* voluntarily dismissed their claims. *See* Notice of Dismissal, *Hawaii v. Trump*, No. 17-cv-50 (D. Haw. Aug. 13, 2018), ECF No. 415.

With respect to the Fourth Circuit's decision in *IRAP*, the Supreme Court granted review, vacated the Fourth Circuit's judgment, and remanded the case back to the Fourth Circuit for further consideration in light of *Hawaii*. *See IRAP v. Trump*, 138 S. Ct. 2710 (2018). On October 2, 2018, the Fourth Circuit entered an order "remand[ing] this case to the district court for further proceedings consistent with the Supreme Court's decision." *IRAP v. Trump*, 905 F.3d 287 (4th Cir. 2018). Four judges separately concurred in that order, observing that the Supreme Court's decision "fundamentally disagreed with our reasoning and conclusions" in the *IRAP* opinion, and that the

Supreme Court's decision should also be viewed as having overruled "the reasoning and conclusions reached by the district court[.]" *Id.*

Following the Fourth Circuit's remand order, the plaintiffs in all three of these cases indicated their desire to continue with their claims, and the *IAAB* and *Zakzok* plaintiffs filed amended complaints. *See generally* IRAP ECF No. 260; IAAB ECF Nos. 76, 78; Zakzok ECF Nos. 60, 62. The Government now moves to dismiss the complaints in all three cases.

STANDARD OF REVIEW

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the complaint. The motion should be granted unless the complaint 'states a plausible claim for relief.'" *In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2017) (internal citation omitted, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Although a court must accept all factual allegations as true, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678.

ARGUMENT

In light of the Supreme Court's decision in *Hawaii*, plaintiffs' challenges to the Proclamation are meritless and should be dismissed. Plaintiffs bring largely the same claims as the ones that the Supreme Court already rejected, and there is no reason for a different conclusion here. All three of the complaints should be dismissed for failure to state a claim upon which relief can be granted.[3]

[3] Defendants do not dispute that one of the *IAAB* plaintiffs has Article III standing to bring his claims and that his claims are sufficiently ripe. *See* IAAB 2d Am. Compl. (ECF No. 78) ¶ 16 (describing how John Doe #6's relative was denied both a visa and a waiver under the Proclamation); *Hawaii*, 138 S. Ct. at 2417. Although the general rule is that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014), to the extent these cases remain distinct lawsuits, Defendants believe that the *IRAP* and *Zakzok* plaintiffs lack standing for the reasons previously discussed. *See, e.g.*, Defs.' Opp. to Prelim. Inj. Mot. (IRAP ECF No. 212) at 16-18.

I. Plaintiffs' Statutory Claims Should Be Dismissed

A. The Proclamation Is Well Within the President's Authority Under the INA

The *IRAP* plaintiffs claim that the Proclamation exceeds the President's authority under 8 U.S.C. § 1182(f) and violates the non-discrimination provision contained in 8 U.S.C. § 1152(a)(1)(A). *See* IRAP 2d Am. Compl. (ECF No. 203) ¶¶ 392-401. But the Supreme Court unequivocally rejected these very same claims, *see Hawaii*, 138 S. Ct. at 2407-15, and there was nothing tentative about the Court's conclusion: "The Proclamation is squarely within the scope of Presidential authority under the INA." *Id.* at 2415. Thus, these claims should plainly be dismissed.

B. Plaintiffs Cannot Obtain Review of the Proclamation Under the APA

Plaintiffs also bring claims under the APA, alleging both substantive and procedural violations—*i.e.*, that the Proclamation is contrary to law, is arbitrary and capricious, and was issued without following the requisite procedures. *See* IRAP 2d Am. Compl. (ECF No. 203) ¶¶ 413-16; IAAB 2d Am. Compl. (ECF No. 78) ¶¶ 118-21; Zakzok Am. Compl. (ECF No. 62) ¶¶ 104-14.

1. These claims all must fail because the APA does not permit review over the President's actions in issuing the Proclamation. The APA provides for judicial review only with respect to "agency action." 5 U.S.C. §§ 702, 704. The President, however, is not an "agency" within the meaning of the APA, and thus his actions are not reviewable under that statute. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.").

Nor can plaintiffs circumvent this bar by purporting to sue only the agencies tasked with implementing the Proclamation but not the President himself. *See, e.g.*, IAAB 2d Am. Compl. (ECF No. 78) ¶¶ 117-21; Zakzok Am. Compl. (ECF No. 62) ¶¶ 110-14. That is because the "bar on APA review of actions by the President extend[s] to the actions of agencies when they act under a delegation of presidential authority[.]" *Ancient Coin Collectors Guild v. U.S. Customs & Border*

Prot., 801 F. Supp. 2d 383, 402 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012). Indeed, as the Court in *Ancient Coin Collectors Guild* recognized, this rule is in "full force" when an agency is acting on behalf of the President in "an area as sensitive and complex as foreign affairs." 801 F. Supp. 2d at 403. Here, that is exactly what the relevant agencies are doing—carrying out the Proclamation based on a delegation of authority from the President, based in part on the President's authority over foreign affairs. Thus, the agencies' actions implementing the Proclamation remain outside the scope of APA review.

2. Even aside from Presidential action being unreviewable under the APA, plaintiffs' claims also fail to meet other pre-requisites for an APA claim. First, courts cannot review "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That limitation on review applies when the relevant statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, there is no meaningful standard against which a court could evaluate the President's, or the agencies', decisions in connection with § 1182(f). *See Hawaii*, 138 S. Ct. at 2408 ("By its terms, § 1182(f) exudes deference to the President in every clause."); *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552, 1575-76 (S.D. Fla. 1991) (holding that § 1182(f) "provides no discernable standards by which this court can review the challenged actions under the APA"); *cf. Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (even if the Executive "disclose[d] its . . . reasons for deeming nationals of a particular country a special threat," courts would be "unable to assess their adequacy").

Second, plaintiffs have not directed their APA claim against any final agency action. Plaintiffs allege that the defendant agencies have violated the APA "[i]n instituting the Proclamation," IAAB 2d Am. Compl. (ECF No. 78) ¶ 120, and "[i]n issuing and implementing the

Proclamation," Zakzok Am. Compl. (ECF No. 62) ¶ 106. But the agencies' general and ongoing implementation of the Proclamation is not a discrete, identifiable "agency action" subject to challenge. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890-91 (1990) (holding that a plaintiff cannot challenge "the continuing (and thus constantly changing) operations" of the agency over a broad range of subjects, but must instead "direct its attack against some particular 'agency action' that causes it harm"). Additionally, the agencies' actions preceding the Proclamation—*e.g.*, the drafting and submission of a report to the President, *see* IAAB 2d Am. Compl. (ECF No. 78) ¶ 120—were not final agency actions because the report itself "carrie[d] no direct consequences" and instead "serve[d] more like a tentative recommendation than a final and binding determination." *Franklin*, 505 U.S. at 798; *see also Dalton v. Specter*, 511 U.S. 462, 468-70 (1994).

Third, the APA's "general cause of action" exists only for "persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (quoting 5 U.S.C. § 702). Although the alleged injury of family separation is sufficient for Article III purposes, *see* note 3, *supra*, it is a separate question *on the merits* whether the plaintiffs actually have any statutory rights to enforce. And here, the plaintiffs lack any enforceable statutory rights: nothing in the INA confers rights on third-parties like plaintiffs—*i.e.*, U.S. organizations or persons who are not themselves seeking entry to the United States, but instead have an interest in the entry of an alien who is abroad.[4] Accordingly, plaintiffs cannot satisfy these other threshold requirements for an APA claim.

[4] Even when the INA permits a U.S. citizen to file a petition for a foreign family member's classification as a relative for immigrant status, any interest the U.S. person has "terminate[s]" "[w]hen [his] petition [i]s granted." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999). Nothing in the INA authorizes a sponsoring citizen to challenge the later denial of a visa to his relative.

3. Finally, even if plaintiffs could obtain APA review, their claims would fail on the merits. Their assertions that the Proclamation is "contrary to law" are duplicative of their other legal claims, which fail for the reasons discussed both above and below.

As for plaintiffs' claim that the Proclamation is arbitrary and capricious, such a claim is foreclosed by the Supreme Court's recognition that "[t]he 12-page Proclamation . . . thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions[.]" *Hawaii*, 138 S. Ct. at 2409; *see also id.* at 2421 (describing the "persuasive evidence that the entry suspension has a legitimate grounding in national security concerns"); Part II.A, *infra*. Although much of the Supreme Court's analysis was in the context of rational-basis review, the same fundamental principles apply equally under the APA: courts "cannot substitute [their] own assessment for the Executive's predictive judgments on such [national security] matters, all of which are delicate, complex, and involve large elements of prophecy." *Hawaii*, 138 S. Ct. at 2421.

Finally, there is no requirement for the President (or any agency) to engage in notice-and-comment rulemaking when the President exercises his statutory authority under 8 U.S.C. § 1182(f). As mentioned, the President is not an "agency" subject to the APA. *See Franklin*, 505 U.S. at 801. Moreover, the APA itself states that its rulemaking requirements apply "except to the extent that there is involved . . . [a] foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). Here, the Proclamation is expressly crafted to be an instrument of the President's foreign policy. *See, e.g.*, Procl. § 1(h)(i) ("These restrictions and limitations are also needed to elicit improved identity-management and information-sharing protocols and practices from foreign governments; and to advance foreign policy, national security, and counterterrorism objectives."); *Hawaii*, 138 S. Ct. at 2411 ("One of the key objectives of the Proclamation is to

encourage foreign governments to improve their practices[.]"); *see also Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008). Even if plaintiffs could pursue their APA claims, therefore, the claims should still be dismissed on the merits.

C. The Refugee Act Claims are Both Moot and Meritless

The *IRAP* plaintiffs allege a claim under the Refugee Act, arguing that EO-2's actions with respect to refugees were unlawful, and that the Proclamation "could similarly ban the entry of refugees from the affected countries." IRAP 2d Am. Compl. (ECF No. 203) ¶ 410. As an initial matter, because EO-2 has now expired, any claims regarding EO-2 are now moot—as the Supreme Court has confirmed. *See Trump v. IRAP*, 138 S. Ct. 353 (2017) (directing that challenges to EO-2 be "dismiss[ed] as moot" because EO-2 "expired by its own terms on September 24, 2017").

As for the sole allegation regarding the Proclamation—that it "*could* similarly ban the entry of refugees," IRAP 2d Am. Compl. (ECF No. 203) ¶ 410 (emphasis added)—that allegation is plainly contradicted by the Proclamation itself, which has nothing to do with refugees. Indeed, the Proclamation addresses refugees only to make clear that they are *not* affected by it. *See* Procl. § 6(e) ("Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States."); *see also id.* § 3(b)(vi).[5] Thus, plaintiffs have alleged no plausible refugee-related claims.[6]

[5] The subject of refugee admissions was subsequently addressed in an entirely separate Executive Order, which none of the plaintiffs here has challenged. *See* Exec. Order No. 13,815, *Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities*, 82 Fed. Reg. 50,055 (Oct. 27, 2017).

[6] Any refugee-related claims would also fail because the Refugee Act contains no private right of action. *See, e.g.*, *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1506 (11th Cir. 1992); *Alabama v. United States*, 198 F. Supp. 3d 1263, 1268-73 (N.D. Ala. 2016); *Texas Health & Human Servs. Comm'n v. United States*, 193 F. Supp. 3d 733, 739 (N.D. Tex. 2016). And the Refugee Act is similarly not enforceable under the APA for the reasons discussed above. *See* Part I.B, *supra*.

D. Plaintiffs Have Not Stated a Plausible Claim Under RFRA

The *IRAP* plaintiffs also claim that the Proclamation violates RFRA with respect to certain unspecified "Muslim Plaintiffs." IRAP 2d Am. Compl. (ECF No. 203) ¶ 403. But their complaint contains nothing more than a "[t]hreadbare recital[] of the elements of a [RFRA] cause of action." *Iqbal*, 556 U.S. at 678. Such conclusory assertions "do not suffice" to state a claim under Rule 12(b)(6), *id*., and thus, the *IRAP* plaintiffs' RFRA claim should also be dismissed.

RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person" is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1. To establish a prima facie RFRA claim, a plaintiff must allege (1) an exercise of religion, (2) that is grounded in a sincerely held religious belief, and (3) that is substantially burdened by the challenged government action. *See Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 99 (4th Cir. 2013); *Goodall by Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 171-73 (4th Cir. 1995). A substantial burden exists when government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). Thus, for example, a plaintiff may establish a substantial burden by showing that a law "forces [him] to engage in conduct that [his] religion forbids or that it prevents [him] from engaging in conduct [his] religion requires." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). "[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not constitute substantial burdens on the exercise of religion. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988).

Plaintiffs have not sufficiently alleged any of the elements of a prima facie RFRA claim.

The *IRAP* complaint asserts that the Proclamation "place[s] a substantial burden on Muslims' exercise of religion" by "denying or impeding [them], on account of their religion, from accessing benefits relating to their own or their family members' immigration status." IRAP 2d Am. Compl. (ECF No. 203) ¶¶ 403-04. "While legal conclusions" such as this "can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. And here, they are not. The *IRAP* complaint does not identify any particular plaintiff whose religious exercise purportedly has been substantially burdened by the Proclamation. Nor does it identify any particular exercise of religion, much less allege that any such exercise is grounded in a particular plaintiff's sincerely held religious belief. Nor have plaintiffs shown that any burden on religious exercise (and none is sufficiently alleged) could not be addressed through the case-by-case waiver process provided for in the Proclamation.

Indeed, the *IRAP* complaint identifies only two plaintiffs who practice the Muslim faith. *See* IRAP 2d Am. Compl. (ECF No. 203) ¶¶ 41, 44. For the remaining plaintiffs, the complaint is either silent or specifies that plaintiffs are non-practicing Muslims. *See, e.g.*, *id*. ¶¶ 35, 37, 43, 45. And the two plaintiffs who practice Islam are either U.S. citizens or lawful permanent residents, to whom the Proclamation does not apply. *See id*. ¶¶ 41, 44. Thus, the Proclamation could not directly impose a substantial burden on these plaintiffs' religious exercise. Furthermore, plaintiffs cannot bring a RFRA claim on behalf of any family members that may be seeking to enter the United States from abroad, *see, e.g., id*. ¶¶ 41, 44, 332, given that "aliens . . . located outside sovereign United States territory at the time their alleged RFRA claim arose" are not "person[s]" within the meaning of RFRA. *Rasul v. Myers*, 512 F.3d 644, 672 (D.C. Cir.), *cert. granted, judgment vacated on other grounds*, 555 U.S. 1083 (2008).

In short, the *IRAP* complaint's "naked assertions devoid of further factual enhancement"—

which amount to no more than an allegation that the Proclamation might violate the RFRA rights of someone, somewhere, somehow, at some point—cannot sustain a RFRA claim. *Iqbal*, 556 U.S. at 678. And, even if plaintiffs could meet their burden of alleging a prima facie RFRA claim, the Proclamation is the least restrictive means of furthering the government's compelling national-security interests, for the same reasons that the Supreme Court identified when upholding the Proclamation. *See* Part II.A, *infra*.[7]

E. All of Plaintiffs' Statutory Claims are Foreclosed by Fundamental Principles of Non-Reviewability

As the Government has previously explained, the Executive Branch's denial of entry to an alien is generally not subject to challenge on statutory grounds unless Congress has affirmatively authorized such review. *See, e.g.*, Defs.' Opp. to Prelim. Inj. Mot. (IRAP ECF No. 212) at 9-12. This Court need not address this reviewability argument to the extent it dismisses plaintiffs' statutory claims on the merits. *See Hawaii*, 138 S. Ct. at 2407 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993)). If the Court is inclined to allow plaintiffs' statutory claims to proceed, however, then the Court must consider whether the claims are even reviewable in the first place.

In *Hawaii*, the Supreme Court described this non-reviewability argument as "present[ing] a difficult question." 138 S. Ct. at 2407. The Government maintains that this argument is well-supported by longstanding principles of sovereignty, as well as the history and structure of the INA. *See, e.g.*, *Knauff*, 338 U.S. at 543 ("Whatever the rule may be concerning deportation of

[7] Plaintiffs' RFRA claim also would not provide a basis for enjoining the Proclamation as a whole, as Plaintiffs request. *See* IRAP 2d Am. Compl., Prayer for Relief. Instead, any relief would be limited to removing the specific burden on religious exercise of the individual plaintiff (or plaintiffs) that is found to prevail on his or her RFRA claim. *See* 42 U.S.C. § 2000bb–1(c) ("A *person* whose religious exercise has been burdened in violation of this section may . . . obtain appropriate relief against a government." (emphasis added)); *Borzych v. Frank*, 439 F.3d 388, 391 (7th Cir. 2006); *State of Neb. Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006).

persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); 8 U.S.C. § 1252 (establishing a comprehensive framework for judicial review of decisions concerning aliens' ability to enter or remain in the United States, but not providing any review for the denial of a visa or entry to an alien located abroad, either by that alien or by third-parties interested in the alien's admission); 6 U.S.C. § 236(f) (no "private right of action" to challenge decision "to grant or deny a visa").

Plaintiffs' response is largely to suggest that these non-reviewability principles "only appl[y] to individual visa denials by consular officials abroad." Pls.' Reply Mem. in Supp. of Prelim. Inj. (IRAP ECF No. 216) at 11. But this argument ignores that these principles of non-reviewability are grounded in the separation of powers, *see Saavedra Bruno*, 197 F.3d at 1159, and it would be just as intrusive—if not more so—for a court to overturn the President's broad policy judgments as it would be for a court to overturn an individual consular officer's decision with respect to a single alien. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (stating that "*any policy* toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," which are matters "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" (emphasis added)); *see also Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 491 (recognizing limitations on courts' abilities to evaluate the Executive's policy judgments regarding nationals of foreign countries).

Indeed, the particular claims that plaintiffs bring here underscore why the principles of non-reviewability still apply. All three sets of plaintiffs seek to bring APA claims. *See* Part I.B, *supra*. But in the one instance in which the Supreme Court held that aliens physically present in

the United States could seek review of their exclusion orders under the APA, the Court made clear it was not "suggest[ing]" that "an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." *Brownell v. Tom We Shung*, 352 U.S. 180, 184-186 & n.3 (1956). And following that decision, Congress then intervened to foreclose APA review even for aliens present here, *see Saavedra Bruno*, 197 F.3d at 1157-1162, because allowing such APA suits would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant." H.R. Rep. No. 87-1086, at 33 (1961). Allowing plaintiffs' broad-ranging APA claims here would be particularly inappropriate in light of this history demonstrating Congress's intent to foreclose and reject such claims.

Additionally, Plaintiffs' RFRA claims are inherently individualized, focusing on each plaintiff's own religious beliefs and circumstances. *See* Part I.D & n.7, *supra*. Thus, review of those claims would presumably require a fact-based inquiry into each plaintiff's circumstances, including into the particular reasons why each plaintiff's relative was denied a visa and/or waiver under the Proclamation and whether those reasons are "in furtherance of a compelling governmental interest[.]" IRAP 2d Am. Compl. (ECF No. 203) ¶ 405. Even under plaintiffs' version of consular non-reviewability, therefore, plaintiffs' RFRA claims should be held non-reviewable.

Finally, the relief that plaintiffs seek in these cases further highlights why their broad claims should be held non-reviewable. For example, in addition to an injunction against enforcement of the Proclamation, the *IAAB* plaintiffs also request that the Court: "[r]equire Defendants to instruct the consular officials handling the visa applications of Plaintiffs, their families, and IAAB's invitees and others attending IAAB programs to print and issue the visas and travel documents

within 10 days of the Court's order;" "[r]equire Defendants to process without undue delay visa applications submitted by nationals of Iran, Libya, Syria, Yemen, and Somalia;" and "[r]equire Defendants to file with the Court, on the tenth day of each month following the entry of the Court's order, a signed and verified declaration" containing extensive details about the number of visas approved and denied, as well as the "the facts, authorities, and reasoning relevant to" each visa denial. IAAB 2d Am. Compl. (ECF No. 78) ¶¶ 132, 134, 135. As this requested relief demonstrates, judicial resolution of plaintiffs' broad claims—and providing relief on those claims if successful—would still implicate the same separation of powers concerns that preclude judicial review over individualized claims. Even were the Court to enter a generalized order prohibiting enforcement of the Proclamation, it would still threaten to "inject[] the judge into day-to-day agency management," *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66-67 (2004), overseeing individualized visa decisions and overall visa processing, contrary to the bedrock principles of consular non-reviewability. Thus, review over the generalized claim should likewise be unavailable.[8]

In short, all of plaintiffs' statutory claims should be dismissed: each one is legally meritless, and judicial review over the claims is precluded in any event. Thus, the Court should dismiss all of the statutory claims in the three complaints.

II. Plaintiffs' Constitutional Claims Should Be Dismissed

Plaintiffs raise a number of constitutional challenges to the Proclamation. They claim it singles out Muslims for disfavored treatment in violation of the Establishment Clause;

[8] All three sets of plaintiffs have also made clear their intent to seek intrusive discovery if allowed to continue with their claims. *See* Defs.' Mot. to Stay (IAAB ECF No. 63-1) at 14-21; Defs.' Reply on Mot. to Stay (IAAB ECF No. 66) at 18-28. Plaintiffs' intent to conduct intrusive discovery is still further proof that even generalized legal claims can implicate the separation of powers principles underlying the doctrine of consular nonreviewability.

discriminates on the basis of religion, national origin, and race in violation of the equal protection component of the Fifth Amendment's Due Process Clause; restricts plaintiffs' rights to receive information and free association under the First Amendment; and deprives plaintiffs of their purported liberty interest in family reunification without due process of law. *See* IRAP 2d Am. Compl. (ECF No. 203) ¶¶ 376-90 (Counts I-III); IAAB 2d Am. Compl. (ECF No. 78) ¶¶ 92-103, 111-16, 122-25 (Counts I-IV, VI); Zakzok Am. Compl. (ECF No. 62) ¶¶ 98-102 (Count I).

All of these claims are foreclosed by the Supreme Court's decision in *Trump v. Hawaii*, which made clear that all constitutional challenges to the Proclamation are governed by the standard set forth in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and that the Proclamation satisfies *Mandel*'s standard. *See Hawaii*, 138 S. Ct. at 2417-23. Moreover, although this Court need not reach any other arguments in light of *Hawaii*'s binding force, several of plaintiffs' constitutional claims fail for additional reasons as well. Plaintiffs' constitutional claims should thus be dismissed for failure to state a claim.

A. Plaintiffs' Constitutional Claims are Foreclosed by the Supreme Court's Decision in *Trump v. Hawaii*

Although the only constitutional challenge at issue in *Hawaii* was an Establishment Clause claim, the Supreme Court made clear that the same standard of review governs all challenges to the Proclamation brought by U.S. citizens claiming a violation of their constitutional rights. No matter what constitutional right is at issue, courts must apply the deferential standard of review set forth in *Mandel*. *See Hawaii*, 138 S. Ct. at 2419 (noting that the Supreme Court has "reaffirmed and applied [*Mandel*'s] deferential standard of review across different contexts and constitutional claims"); *id*. at 2420 n.5 (stating that *Mandel*'s "circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals"). Indeed, the Supreme Court has applied *Mandel* to resolve challenges brought under each of the constitutional provisions that plaintiffs raise here.

See id. at 2417-23 (Establishment Clause claim); *Fiallo v. Bell*, 430 U.S. 787, 792-96 (1977) (equal protection claim); *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in judgment) (due process claim), as modified by *Hawaii*, 138 S. Ct. at 2419; *Mandel*, 408 U.S. at 764-65 (First Amendment claim); *see also Rajah*, 544 F.3d at 438 (claims alleging discrimination based on "religion, ethnicity, gender, and race"). This Court thus does not need to engage in an individualized assessment of each of plaintiffs' constitutional claims. Instead, the Court need only ask one question: does the Proclamation satisfy *Mandel*'s deferential standard of review?

The Supreme Court has already answered that question in the affirmative. In *Hawaii*, the Court held that the Proclamation satisfies not only *Mandel*'s "conventional application," but also "rational basis review." *Hawaii*, 138 S. Ct. at 2420. Rejecting each of the arguments plaintiffs assert here, the Court concluded that "there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility," and therefore the Court "must accept that independent justification." *Id.* at 2421. Thus, the Court held that "plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim." *Id.* at 2423.

As a formal matter, of course, the Court's holding was limited to the preliminary-injunction context because that was the judgment before the Court at that time. *See id.* at 2406-07. The reasoning of the Court's decision, however, forecloses plaintiffs' claims even outside the preliminary-injunction context. The Court considered numerous statements allegedly demonstrating the President's discriminatory intent, *see id.* at 2417-18, but then held that courts "must consider not only the statements of a particular President, but also the authority of the Presidency itself." *Id.* at 2418. The Court then went on to examine numerous aspects of the Proclamation—the same aspects that plaintiffs attack here—and explained why the Proclamation

was lawful. Nothing about the Court's legal reasoning was tentative, and none of the relevant features of the Proclamation has changed since the Supreme Court issued its decision. Thus, the same features of the Proclamation that the Supreme Court found were dispositive should also be dispositive here.

First, the Court explained that "[t]he Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." *Id*. at 2421. The Court noted that the text of the Proclamation "says nothing about religion." *Id*. And, although the plaintiffs in *Hawaii*, like plaintiffs here, argued that most of the nations included in the Proclamation have Muslim-majority populations, the Court determined that this fact did "not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks." *Id*.

Second, the Court explained that the Proclamation "reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies." *Id*. The Court rejected the *Hawaii* plaintiffs' attempts to discredit the findings of this review (an attempt plaintiffs mimic here) by noting that the Proclamation adequately explains any deviations from the worldwide review's baseline criteria by specifying how, in each case, the deviations "were justified by the distinct conditions in each country." *Id*. The Court also dismissed any efforts to challenge the Proclamation based on the plaintiffs' "perception of its effectiveness and wisdom." *Id*. It is not appropriate, the Court explained, for courts to "substitute [their] own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve

large elements of prophecy.'" *Id*.[9]

Finally, the Court identified several additional features of the Proclamation supporting its connection to a legitimate national security interest. *See id*. at 2420, 2422-23. The Proclamation "establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated," and one Muslim-majority country (Chad) has already had its entry suspensions terminated. *Id*. at 2422. Moreover, even for countries that remain subject to entry restrictions, the Proclamation "includes significant exceptions for various categories of foreign nationals." *Id*. And the Proclamation also "creates a waiver program" to permit entry of foreign nationals meeting specified criteria. *Id*. Like plaintiffs here, the *Hawaii* plaintiffs asserted that "not enough individuals [were] receiving waivers or exemptions." *Id*. at 2423 n.7. The Court explained, however, that these allegations, even if they could be considered under rational basis review, did "not affect" the Court's conclusion that the Proclamation satisfies rational basis review. *Id*.

Plaintiffs' constitutional claims cannot survive in light of the Supreme Court's prior analysis upholding the Proclamation's validity. The Court's analysis was thorough and none of the relevant features of the Proclamation has changed since the Court's decision. In short, plaintiffs' complaints here offer nothing more than a rehashing of the same claims and arguments the Supreme Court already rejected in *Hawaii*. Because the Supreme Court has already held that

[9] Plaintiffs here seek to attack the Proclamation's wisdom based on the fact that the DHS report preceding it "was a mere 17-pages long[.]" IAAB 2d Am. Compl. (ECF No. 78) ¶ 69. But neither of the DHS reports was required to contain a detailed discussion of every country's individual practices; the President directed that the reports focus on the countries that were not providing adequate information. *See* EO-2 § 2(b), (e). And in any event, the Supreme Court made clear that it would not second-guess the Proclamation based on the length of the Secretary's report—"a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it." *Hawaii*, 138 S. Ct. at 2421.

the Proclamation exhibits "a sufficient national security justification to survive rational basis review," *id*. at 2423, plaintiffs' constitutional claims should be dismissed pursuant to binding precedent.

B. Plaintiffs' Constitutional Claims Also Fail for Additional Reasons

In addition to being foreclosed by *Hawaii*, several of plaintiffs' constitutional claims also fail for the additional threshold reasons set forth below.

1. Plaintiffs cannot state a due process claim because the Due Process Clause does not confer an entitlement on persons in the United States regarding the entry of others. To assert a due process claim, a plaintiff must first show that he has been deprived of a liberty or property interest. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam). But plaintiffs do not have a cognizable liberty or property interest in having their foreign national family members be issued a visa or be admitted into this country. *See, e.g.*, *Din*, 135 S. Ct. at 2135 (plurality op.) ("[A] long practice of regulating spousal immigration precludes Din's claim that the denial of [her husband's] visa application has deprived her of a fundamental liberty interest."); *Fiallo*, 430 U.S. at 795 n.6 (rejecting the premise that "the families of putative immigrants . . . have an interest in their admission"); *cf. Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) ("[W]e think the wife has no constitutional right which is violated by the deportation of her husband."). Because the Proclamation does not deprive plaintiffs of any liberty or property interest, their due process claim fails at the outset.

Moreover, with respect to the only plaintiff whose relative has been denied both a visa and a waiver under the Proclamation—*i.e.*, John Doe #6's mother-in-law, *see* note 3, *supra*—the Government explained the mother-in-law's visa denial with reference to a statutory citation. *See* IAAB 2d Am. Compl. (ECF No. 78) ¶ 16 (noting that the mother-in-law received a letter stating that a "consular official found [her] ineligible for a visa under Section 212(f) of Immigration and

Nationality Act, pursuant to Presidential Proclamation 9645"). Even if John Doe #6 (or his mother-in-law) had a protected liberty interest, therefore, that statutory citation was sufficient to satisfy due process. *See Hawaii*, 138 S. Ct. at 2419 ("In *Din*, Justice Kennedy reiterated that 'respect for the political branches' broad power over the creation and administration of the immigration system' meant that the Government need provide only a statutory citation to explain a visa denial.").

2. Plaintiffs also cannot state a claim under the Establishment Clause or the Equal Protection Clause because they have not alleged a violation of their *own* rights under those provisions. The exclusion of aliens abroad typically raises no constitutional questions because "an alien who seeks admission to this country may not do so under any claim of right." *Knauff*, 338 U.S. at 542. As explained above, courts may engage in limited judicial review of the exclusion of an alien abroad under *Mandel*, but only when a U.S. citizen alleges that the exclusion violates the citizen's *own* constitutional rights. *See Mandel*, 408 U.S. at 756-759, 762-770; *see also Din*, 135 S. Ct. at 2131. But here, plaintiffs' claims stem from alleged infringement of the rights of plaintiffs' family members, not plaintiffs' own rights. Thus, plaintiffs' claims cannot proceed. *Cf. Hawaii*, 138 S. Ct. at 2416 (declining to decide this issue because the argument goes to "the scope of plaintiffs' Establishment Clause rights," which "concerns the merits . . . of plaintiffs' claims").

In *McGowan v. Maryland*, 366 U.S. 420 (1961), the Supreme Court held that individuals who are indirectly injured by alleged religious discrimination against others generally may not sue, because they have not suffered violations of their own constitutional rights to religious freedom. *Id*. at 429-30. The *McGowan* Court concluded that the plaintiffs—employees of a store subject to a State's Sunday-closing law—could not challenge that law on free exercise grounds because they "d[id] not allege any infringement of their own religious freedoms." 366 U.S. at 429. By contrast,

the plaintiffs could pursue their Establishment Clause claim, because they alleged a "direct . . . injury, allegedly due to the imposition on them of the tenets of the Christian religion": namely, they had been prosecuted under the Sunday-closing law. *Id*. at 430-431; *see id*. at 422.

Similarly, the Supreme Court has made clear in the context of both equal protection and Establishment Clause claims that "the stigmatizing injury often caused by racial [or other invidious] discrimination . . . accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984); *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982) ("the psychological consequence presumably produced by observation of conduct with which one disagrees" is not the type of "personal injury" that supports standing, "even though the disagreement is phrased in [Establishment Clause] terms"). Although these cases talk in terms of prudential standing, the Supreme Court has since made clear that the principle announced in the cases goes to the merits of a plaintiff's claims. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014); *see also Hawaii*, 138 S. Ct. at 2416.

Here, the Proclamation does not regulate plaintiffs at all; it applies only to aliens abroad. Plaintiffs can therefore only claim that the Proclamation violates the Establishment Clause and the Equal Protection Clause because it discriminates against their foreign national relatives and clients. But U.S. plaintiffs cannot assert derivative Establishment Clause or equal protection claims predicated on indirect effects of alleged discrimination against aliens who themselves have no rights to assert. Put another way, the Proclamation cannot plausibly be said to discriminate against plaintiffs or any other U.S. citizens or residents on the basis of religion, national origin, or race because plaintiffs are not subject to the Proclamation and *their* religion, national original, and race are irrelevant to its operation. And plaintiffs' foreign relatives and associates have no rights to

claim under the Establishment or Equal Protection Clauses. *See Hawaii*, 138 S. Ct. at 2419 (noting that "foreign nationals seeking admission have no constitutional right to entry"). Accordingly, plaintiffs' Establishment Clause and equal protection claims should be dismissed for this predicate reason as well.

CONCLUSION

Because the Supreme Court's decision in *Trump v. Hawaii* forecloses all of plaintiffs' statutory and constitutional claims, this Court should dismiss the complaints in all three cases for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT K. HUR
United States Attorney

JOHN R. TYLER
Assistant Director, Federal Programs Branch

/s/ Daniel Schwei
DANIEL SCHWEI (Bar No. 96100)
MICHELLE R. BENNETT (Bar No. 806456)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington DC 20005
Tel: (202) 305-8693
Fax: (202) 616-8460
E-mail: daniel.s.schwei@usdoj.gov